

GOH JOON

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v.

KERAJAAN NEGERI JOHOR & ORS

HIGH COURT MALAYA, JOHOR BAHRU

b

ABDUL MALIK ISHAK J

[ORIGINATING SUMMONS NO: 24-645-1997]

23 FEBRUARY 1998

CIVIL PROCEDURE: Declaration - Application for declaration that agreement to acquire land by 1st respondent/State Authority was null and void - Withdrawal of acquisition by 1st respondent/State Authority - Whether 1st respondent/State Authority could acquire land in future - Whether declaration involved future rights - Whether hypothetical - Whether should be granted

c

LAND LAW: Acquisition of land - Potential development value - Whether incumbent on 2nd respondent to acquire land - Whether 1st & 2nd respondents protected by Public Authorities Protection Act 1948

d

CIVIL PROCEDURE: Declaration - Application for declaration that agreement to acquire land by 1st respondent/State Authority was null and void - Whether appellant must show a cause of action

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CIVIL PROCEDURE: Declaration - Application for declaration that agreement to acquire land by 1st respondent/State Authority was null and void - Withdrawal of acquisition by 1st respondent/State Authority - Whether application for declaration was an abuse of process

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In this case, the appellant's land was acquired by the state authority under a development cum joint venture agreement ('agreement'). However, the acquisition exercise was subsequently withdrawn. Notwithstanding, the said withdrawal, the appellant, by an originating summons in encl. 3 ('encl. 3'), sought for a declaration that the agreement was null and void and as such, the 1st respondent was not contractually obliged to acquire his land under the agreement.

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The 2nd, 3rd and 4th respondents applied successfully to strike out encl. 3. Hence, the instant appeal.

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Amongst the issues before this court were: (1) whether the 1st respondent was entitled to judgment as it did not file an application to strike out encl. 3; (2) whether the Public Authorities Protection Act 1948 ('PAPA') applied; (3) whether the appellant had the *locus standi* to file encl. 3; (4) whether the appellant must show a reasonable cause of action in order to obtain a

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- a* declaration; (5) whether the appellant's action was not *bona fide* and was used as a proxy for another party; and (6) whether the declaration sought for was hypothetical.

Held:

- b* [1] Since the 2nd, 3rd and 4th respondents succeeded in their application to strike out encl. 3, the 1st respondent too must share that victory as the whole substratum of the case centred on the agreement.
- c* [2] The 1st respondent was magnanimous enough and in fact had acted graciously in withdrawing the acquisition exercise. In sparing the appellant's land from being acquired, the 1st respondent need not gazette that withdrawal but they did just that.
- d* [3] A declaratory relief is discretionary in nature and the court is always expected to exercise its judgment as to the reasonability and necessity of granting such a relief. The court may refuse to entertain declaratory proceedings where there is no dispute at all, or where the matter is highly hypothetical or where it involves future rights.
- e* [4] It was obvious that the agreement stipulated the commercial development for the benefit of the 2nd respondent. By virtue of s. 18 of the Johore State Islamic Economic Development Corporation Enactment 1976, the 2nd respondent was empowered to do such other things as it deemed fit for the effective carrying out of its functions and powers. As such, it was incumbent on the part of the 2nd respondent to undertake the development as envisaged under the agreement. The 2nd respondent had demonstrated squarely that it was within the category of s. 2 of PAPA.
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- g* [5] Since the appellant was not a party under the agreement, then both the 1st and 2nd respondents were entitled to seek protection of PAPA. But had the originating summons in encl. 3 been filed by either the 3rd or 4th respondents who were parties to the agreement, then the protection of PAPA would not come to the aid of the 1st and 2nd respondents.
- h* [6] On the appellant's allegation that the 1st and 2nd respondents failed to show the existence of a public duty, this would depend on whether they were public authorities. If the answer was in the negative, then PAPA would not apply. If the answer was in the affirmative, the next question would be whether the neglect or default of the respondents amounted to a neglect or default in the execution of their statutory duty or authority. If the answer was in the affirmative, then PAPA would apply. Both the 1st and 2nd respondents passed the tests with flying colours.
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- [7] On the issue that affidavits-in-support were not filed in the striking out application of encl. 3, failure to file affidavits-in-support under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 was not fatal. *a*
- [8] The 1st respondent had withdrawn the acquisition of the appellant's land even before the appellant filed encl. 3. There was thus nothing on record for the appellant to complain about. The appellant was nothing more than a "mere busy-body", a "mischief maker" out to seek personal satisfaction for himself. It was an academical exercise and the declaration sought for was merely hypothetical which would serve no useful purpose at all. Further, the appellant had not shown "sufficient interest" to seek a declaration. The appellant was not a party to the agreement and his fear that his land would be acquired had abated by the withdrawal of that acquisition exercise by the 1st respondent. All the citizens in the country are subject to the Land Acquisition Act 1960 ('LAA') and the state authority can invoke the provisions of LAA at any time. No one would be spared. Thus, the appellant had no *locus standi* to pursue encl. 3. *b*
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- [9] Section 18 of the Johore State Islamic Economic Development Corporation Enactment 1976 ('JSI') did not impose a statutory duty on the 2nd respondent to consult the appellant in matters of land acquisition notwithstanding the fact that the agreement sought to acquire the appellant's land. The JSI gave statutory strength to the 2nd respondent and the latter had acted within that framework. There was no evidence emanating from the appellant that he filed encl. 3 on behalf of the other land owners. There was also no evidence that the appellant sustained serious suffering and damage peculiar to him. *e*
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- [10] The appellant failed to show that he had suffered exceptional damage "above any injury by the public at large". The 2nd respondent would suffer damage of a special kind if the declaration sought for in encl. 3 was acceded to by this court. It would be a waste of precious judicial time to proceed with encl. 3 as the whole matter had become academic or hypothetical simply because the acquisition had been withdrawn. *g*
- [11] On whether the plaintiff must show a cause of action in order to obtain a declaration, whilst s. 41 of the Specific Relief Act 1950 enabled the appellant to seek declaration as to his legal character or status or right to property, O. 51 r. 16 of the Rules of the High Court 1980 gave some leeway, in that the appellant need only establish that his legal interests were peculiarly affected. *h*

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- a* [11a] Even if a declaration was granted by this court in favour of the appellant, there was nothing to prevent the 1st respondent from acquiring the appellant's land as there was no requirement under the LAA for the 1st respondent to enter into an agreement of whatever kind in order to acquire the appellant's land.
- b* [12] If the question is a live issue at the time when the action is brought and raised substantial legal questions, a declaration will be granted even though this relief has been rendered virtually unnecessary by the lapse of time. In this instance, when encl. 3 was filed, the issue was already dead as the 1st respondent had withdrawn the acquisition exercise. There was nothing left for this court to declare.
- c*
- d* [13] It was clear that the appellant came to court carrying the torch of someone else. If the appellant's grievance was in regard to the acquisition, he should seek his remedy under the LAA by challenging the award, but this was not the case. It must be emphasised that the government of the day can at any time, if not for the agreement or for any other reason, proceed to acquire not only the appellant's land but also other lands belonging to other land owners. Here, the government of the day was not denying the appellant's title to his land.
- e* [13a] The language employed in drafting encl. 3 was crafted and designed to create mischief of the highest order because it was drafted outside the scope of s. 41 of the Specific Relief Act 1950. Enclosure 3 was "a piece of useless litigation and an abuse of process which ... ought not to be encouraged" and to be dismissed forthwith. Further, the declaration sought for was hypothetical and was not a declaration of his right but
- f* a declaration that the 1st respondent was not obliged to acquire his land.
- g* [14] There would be a relitigation of the same issues if this court ruled that the instant application should only be decided between the 2nd, 3rd and 4th respondents. It must also include the 1st respondent.
- [15] As the proposed acquisition had been withdrawn, the appellant's motive in filing encl. 3 can be said to be "improper or vexatious or frivolous". Judicial review should not be exercised in favour of the appellant.
- h* [Application dismissed.]

Cases referred to:

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 (*aff*)

Biswanath v. Mytaba AIR 1941 Oudh 422 (*refd*)

- i* *Blackburn v. Attorney-General* [1971] 1 WLR 1037 (*refd*)

- Booth & Co (International) Ltd and others v. National Enterprise Board and others* [1978] 3 All ER 624 (**refd**) **a**
- Bradford Corporation v. Myers* [1916] 1 AC 242 (**refd**)
- Bruce v. The Commonwealth Trade Marks Label Association* [1907] 4 CLR 1569 (**refd**)
- California v. San Pablo and Tulare Railroad* [1893] 149 US 308 (**refd**) **b**
- Chop Chuah Seong Joo v. Teh Chooi Nai & Ors* [1963] 29 MLJ 96 (**refd**)
- Curtis v. Sheffield* [1882] 21 Ch D 1 (**refd**)
- Chhakouri v. Secretary of State*, 5 Pat LJ 66 (**refd**)
- Datuk Syed Kechik bin Syed Mohamed v. The Governments of Malaysia and Sabah* [1979] 2 MLJ 101 (**refd**)
- Draper v. British Optical Association* [1938] 1 All ER 115 (**refd**) **c**
- Faber v. Gosforth UDC* [1903] 88 LT 549 (**refd**)
- Faryad Fatima v. Mujahid Abhas* AIR 1934 All 1064 (**refd**)
- Gibson v. Union of Shop, Distributive and Allied Workers* [1968] 2 All ER 252 (**refd**)
- Glasgow Navigation Company v. Iron Ore Company* [1910] AC 293 (**refd**)
- Government of Malaysia v. Lim Kit Siang, United Engineers (M) Berhad v. Lim Kit Siang* [1988] 1 CLJ 219 (**refd**) **d**
- Government of Malaysia v. Ooi Kheng Kee* [1976] 1 MLJ 171 (**dist**)
- Griffiths v. Smith* [1941] AC 170 (**refd**)
- Guaranty Trust Company of New York v. Hannay & Company* [1915] WN 38 (**refd**)
- Haji Hussin bin Haji Ali & Ors v. Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 CLJ 214 (**refd**)
- Kathama Natchiar v. Dorasinga* [1875] 2 IA 169 (**refd**) **e**
- Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors and other appeals* [1997] 4 CLJ 253 (**refd**)
- Ibrahim bin Mohamad v. Ketua Polis Daerah Johor Bahru & Ors* [1996] 2 AMR 1964 (**aff**)
- Ismail v. Patna Municipality* AIR 1943 Pat 34 (**refd**) **f**
- Lankapur Tea Co v. Gopalpur Tea Co* ILR 63 Cal 1008 (**refd**)
- Lee Hock Ning v. Government of Malaysia* [1972] 2 MLJ 12 (**refd**)
- Lever Bros and Unilever Ltd v. Manchester Ship Canal Co* [1945] 78 Ll LR 507 (**refd**)
- Lim Cho Hock v. Speaker, Perak Legislative Assembly* [1979] 2 MLJ 85 (**refd**)
- Mellstrom v. Garner* [1970] 1 WLR 603 (**refd**) **g**
- Mellstrom v. Garner and Others* [1970] 2 All ER 9 (**refd**)
- Mohamad Salleh v. Lau Siok Kee* [1974] 1 MLJ 102 (**refd**)
- Narain Mitter v. Kishen Soondory Dessee* [1873] IA Supp 149 (**refd**)
- Narain v. Sastri* ILR 37 All 313 (**refd**)
- Narendra v. Basudeo* 14 IC 81 (**refd**)
- Pedley v. Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 CLJ 391 (**refd**) **h**
- Petaling Tin Bhd v. Lee Kian Chan* [1994] 2 CLJ 346 (**refd**)
- Pichai v. Devaji* AIR 1957 Mad 21 (**refd**)
- Pirie v. Richardson* [1927] 1 KB 448 (**refd**)
- Rajeshwar Singh v. Shyam Behari Singh* AIR 1927 Pat 286 (**refd**)
- Ruislip - Northwood Urban District Council v. Lee* [1935] 145 LT 208 (**refd**) **i**

- a** *Re Barnato* [1949] Ch 258 (**refd**)
Re Barnato [1949] Ch 21 (**refd**)
Re Clay [1919] 1 Ch 66 (**refd**)
Rediffusion (Hong Kong) Ltd v. Attorney-General (Hong Kong) [1970] AC 1136 (**refd**)
Roesin v. Attorney-General [1918] 34 TLR 417 (**refd**)
R v. Foreign Secretary, ex parte Rees Mogs [1994] QB 552 (**refd**)
- b** *R v. HM Treasury* [1985] 1 All ER 589 (**refd**)
R v. Inland Revenue Commissioners [1981] 2 All ER 93 (**refd**)
R v. Inspectorate of Pollution, ex parte Greenpeace Ltd (No 2) [1994] 4 All ER 329 (**refd**)
Tan Sri Haji Othman Saat v. Mohamed bin Ismail [1982] 2 MLJ 177 (**refd**)
Thorne Rural District Council v. Bunting [1972] Ch 470 (**refd**)
- c** *Tindall v. Wright* [1922] WN 124 (**refd**)
Tio Chee Hing & Ors v. Government of Sabah [1981] 1 MLJ 207 (**refd**)
Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and other appeals [1996] 1 CLJ 393 (**refd**)
Webster v. Bakewell Rural District Council (No: 2) [1917] LT (**refd**)
- d** *Wong Peng Yan Benjamin v. Genting Bhd & Anor* [1994] 1 CLJ 351 (**refd**)

Legislation referred to:

- Government Proceedings Ordinance 1956, s. 38
 Johor State Islamic Economic Development Corporation Enactment 1976, ss. 14, 18
 Land Acquisition Act 1960, ss. 8, 8(3), (4), 14(1)
- e** Public Authorities Protection Act 1948, s. 2
 Rules of the High Court 1980, O. 18 r. 19(1)(a), O. 52 r. 16
 Specific Relief Act 1950, s. 41

Other sources referred to:

- Halsbury's Laws of England*, vol 9
- f** *An Introduction to Administrative Law*, Peter Cane, 2nd edn
- For the applicant - Lim Kian Leong (Lim Su Kun with him); M/s Lim Kian Leong & Co*
For the 1st respondent - Rasid Sudin, Deputy State Legal Adviser
For the 2nd respondent - Roger Tan Kor Mee (Hanisah Hamzah with him); M/s Nik Saghir & Ismail
- g** *For the 3rd and 4th respondents - M Pathmanathan; M/s Yusof Khan & Pathmanathan*
- Reported by Kavitha Gunasegaran*

JUDGMENT

- h** **Abdul Malik Ishak J:**

By an originating summons in encl. 3, the applicant sought for the following prayers:

- i**

1. A declaration that the Development cum Joint Venture Agreement dated 23rd February 1994 is null and void, invalid and has no legal effect in law pursuant to Section 24 of the Contracts Act 1950 and the Johore Islamic Economic Development Corporation Enactment No. 1 of 1976, and therefore the Kerajaan Negeri Johor is not contractually obliged to acquire the Applicant's land namely Lot 237 Grant 281 in the Mukim of Tebrau, District of Johor Bahru, Johor as required under the aforesaid Agreement; *a*
2. Costs in the cause of this application; and *b*
3. Such further and other reliefs as this Honourable Court deems fit. *c*

and it was supported by an affidavit of the applicant himself in encl. 2 that was affirmed on 9 July 1997.

By encl. 6, the second respondent sought to strike out the originating summons of the applicant under O. 18 r. 19 (1)(a) of the Rules of the High Court 1980 ("RHC") as it disclosed no reasonable cause of action. The third and fourth respondents, not wanting to be left out, filed encl. 7 to strike out the originating summons of the applicant under O. 18 r. 19(1)(a) of the RHC. The senior assistant registrar ("SAR") heard encls. 6 and 7 on 13 August 1997 and acceded to the prayers sought therein. Being aggrieved, the applicant lodged an appeal to the judge-in-chambers as reflected in encl. 11. *d*

It is interesting to note that the first respondent being the government of the state of Johore did not file an application to strike out the applicant's originating summons under O. 18 r. 19(1)(a) of the RHC but sought to ride "piggy back" on the successes of the second, third, and fourth respondents. It was sought to argue that even though the first respondent did not file an application to strike out the applicant's originating summons, yet the first respondent should reap the harvest and be entitled to judgment just like the second, third and fourth respondents for the simple reason that all the respondents were parties to the development cum joint venture agreement dated 23 February 1994 ("agreement"). Somehow it was also argued that it would be ridiculous if the first respondent was left alone to answer the originating summons. *Halsbury's Laws of England*, vol. 9 at p. 428 contains a short passage that merits reproduction. It is worded in this way: *e*

Where an action is brought against joint promisors, and one of them becomes entitled to judgment in his favour by reason of a defence which the others might have pleaded, the others are also entitled to judgment notwithstanding that they did not plead that defence. *f*

and flowing from it, it was ingeniously argued that the first respondent too should be entitled to judgment. The decision of the Court of Appeal in *Pirie* *g*

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- a* v. *Richardson* [1927] 1 KB 448 seems to be on the side of the first respondent. That was an appeal from the decision of Greer J and the facts may be stated thus. The plaintiff sued the defendant *Richardson* for damages for breach of a contract entered into by the plaintiff with a firm in which *Richardson* was at the time a partner. The partnership had been dissolved before the issue of the writ. The former partners *Edleston* and *Palmer* were subsequently added as defendants, and each put in a separate defence. *Palmer* pleaded and proved that the plaintiff had not on his part complied with the conditions of the contract, and as against *Palmer* the action was dismissed. *Richardson* and *Edleston* did not in their defences raise the plea upon which *Palmer* was successful. Greer J refused leave to *Richardson* and *Edleston* to amend, and gave judgment against them jointly for the sum claimed. On appeal, it was held by the Court of Appeal that inasmuch as the three defendants were joint contractors, the plaintiff had but one and the same cause of action against them all; that the fact established by *Palmer* which was common to the whole contract and fatal to any claim upon it, enured to the benefit of the other joint contractors, whether they had pleaded it or not; and that accordingly judgment must be given dismissing the action against *Richardson* and *Edleston* also. It is comforting to note that the decision of the Court of Appeal was unanimous. Lord Hanworth MR at p. 451 to p. 452 of the report had this to say:
- e* This is an appeal by the two defendants *Richardson* and *Edleston*, who take a point which appears not to have been taken or emphasized before Greer J. - namely, that it was a joint contract under which all three were jointly liable, and that inasmuch as it had been established that *Palmer* was not liable it was not possible in law to give effect as against the remaining partners to a contract which had already been held to create no liability against one of the partners.
- f* I regret that the attention of Greer J. was not called to the point, which is this, that under the principle established in *King v. Hoare* 13 M. & W. 494 and *Kendall v. Hamilton* 4 App. Cas. 504 where there is a joint contract there is but one cause of action, and the aggrieved party may sue all the joint contractors or he may sue one of them, but for the purposes of that decision they all stand on the same footing.
- g* Further down the same page and spilling over to p. 453, Lord Hanworth MR continued in these words:
- h* That raises the question what a judge ought to do where there is one cause of action on which the plaintiff relies, and there are three defendants. It is said that Order xix., rule 15, requires each defendant to take all such grounds of defence as the case may require and as, if not raised, would be likely to take the opposite party by surprise, and that these two defendants cannot rely on something which was not contained in their defence. It is pointed out in one of the cases that surprise is the reason and purpose of that rule. It is also said
- i* that the Court ought to act upon the actual facts brought to its attention,

although all the parties have not adopted the same or similar pleading. It appears to me in the present case that the plaintiff was relying on a joint contract and not on a several liability.

a

In the course of the trial attention was drawn to the fact that the plaintiff had failed to establish a liability because he had failed to show that he had performed his part of the contract. No doubt one defendant alone raised that issue, but does that prevent the other defendants from taking advantage of it? Is the Court entitled to give effect to it as against one joint contractor and shut its eyes as against the other joint contractors? According to *In re Robinson's Settlement* [1912] 1 Ch. 717, 727 effect ought to be given to the matters which are brought to the attention of the Court and which can be made available by all parties to show that the plaintiff's claim fails.

b**c**

At p. 453 of the report, Lord Hanworth MR remarked:

It appears to me that that reading of Order xix., rule 15, which is binding on this Court, indicates that effect ought to be given to a matter which is brought to the attention of the Court even though it has not been so brought by all of the defendants in their pleading. They may not in terms have pleaded the matter, but if there is no surprise and the point is effective for one joint contractor it ought to be effective for the other joint contractors.

d

In the same case, Scrutton LJ explained in simple language the principle of law distilled from that case. At p. 454 to p. 455 of the report, Scrutton LJ simply said:

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This case raises a curious point on which there is not so much authority as I could wish; I have not been able to discover any authority which counsel has not already found. The point is that A. sues B., C. and D. on a joint contract. B., C. and D. are not working together because the partnership has been dissolved. D. puts in a defence applicable to the whole contract, but B. and C. do not. D. proves his defence and thereupon the judge gives judgment for D. on the contract. B. and C. have not pleaded D.'s successful defence and the judge has not allowed them to take advantage of the defence proved by D., their joint contractor, but has given judgment against B. and C. So that on one joint contract there have been judgments that B. and C. are liable, but that D. is not, in a matter not peculiar to himself and which, if the judge had taken notice of it, would have relieved B. and C. from liability.

f**g**

The question of joint contractors is wrapped up with a technical rule of law, but one which is far too well established to be interfered with. The rule is stated in *King v. Hoare* 13 M. & W. 494 and in *Kendall v. Hamilton* 4 App. Cas. 504 that you can only have one judgment on a joint contract on grounds which apply to the whole contract. Consequently, if A. has got judgment against B., then judgment against C. and D. is merged. A. cannot sue C. and D. because there is no contract to sue on.

h**i**

- a* As Vaughan Williams L.J. said in *Hammond v. Scholfield* [1891] 1 Q.B. 457 and I said again in *Parr v. Snell* [1923] 1 K.B. 1, there cannot be more than one judgment on one entire contract.

Further down the same page and spilling over to p. 456, Scrutton LJ continued:

- b* A. sues B. and C. on a joint debt. C. pleads that he has paid the sum due to the authorized agent of A. B. does not know about the facts and does not plead the payment. C. proves that he has paid the authorized agent of A. Is the judge bound to give judgment against B. when he has found as a fact that the sum has been paid under the same contract in the same action? In my view it is merely an application of the principle of *King v. Hoare* 13 M. & W. 494 that
- c* there cannot be two contradictory judgments on a joint contract - one to the effect that "You are liable because a sum due on the joint contract has not been paid" and the other to the effect that "You (the joint contractor) are not liable because the sum has been already paid." Such a judgment would stultify the Court.
- d* In a concurring judgment, Romer J in the same case remarked as follows at p. 456 to p. 457 of the report:

- e* I agree. As we are differing with the learned judge I will add a few words. This is an action against joint debtors. Now at one and the same time Greer J. has given judgment against two of the defendants, and has given judgment in favour of the third defendant. No question arises here of illegality or infancy. It is the ordinary case of there being one cause of action and one only. If, therefore, there was no cause of action against Palmer, as Greer J. has held, there was no cause of action against the other two defendants.

- f* There was only one contract that the Court of Appeal had to reckon with in *Pirie v. Richardson [supra]* and in the context of the present case I have to consider one solitary agreement also. In my judgment, since the second, third and fourth respondents succeeded in encls. 6 and 7, the first respondent too must share that victory as the whole substratum of the case centred on that solitary agreement.

g ***The Facts Of The Case***

- h* It was not in dispute that the applicant is the registered owner of a piece of land held under Lot 327, Grant 281 in the Mukim of Tebrau, in the district of Johor Bahru, Johore ("land"). The applicant came to know that his land was acquired by the state authority pursuant to and in compliance with that agreement. Under that agreement the first respondent had agreed to acquire a piece of land including the applicant's land through the second respondent and thereafter to alienate the land involved in that acquisition through the fourth respondent with the financial assistance of the third respondent. The applicant
- i* was said to be very worried and troubled that his land would be acquired.

His fear was well founded. The declaration of intended acquisition in Form D under s. 8 of the Land Acquisition Act 1960 ("LAA") of the applicant's land and those of others as well pursuant to the agreement was published in the gazette on 7 July 1994 and by virtue of s. 8(3) of the LAA a declaration in Form D shall be conclusive evidence that all the scheduled land referred to therein was needed for the purpose specified therein. Under s. 8 (4) of the LAA, a declaration of intended acquisition in Form D shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the gazette when there is no land enquiry held under s. 14(1) of the LAA. In short, when there is no land enquiry within two years after the declaration in Form D, the acquisition shall automatically lapse. In the present case, the State Government of Johore - the first respondent, was magnanimous enough and in fact had acted graciously in withdrawing that acquisition exercise. In sparing the applicant's land and those others from being acquired, the first respondent need not gazette that withdrawal but they did just that. Factually speaking, the agreement was dated 23 February 1994 while Form D was gazetted on 7 July 1994. Automatic lapsing of Form D would be on 6 July 1996 while the withdrawal of the acquisition exercise was gazetted on 3 July 1997. It must be stressed that the applicant's originating summons in encl. 3 was filed on 9 July 1997. Notwithstanding the withdrawal of that acquisition exercise, the applicant felt that he had every right to know the status of his land as well as the future of his land. It was with these in mind that the applicant sought for a declaration in the originating summons in regard to the status of that agreement because out of that very agreement his land was gazetted, once upon a time, for acquisition.

Declaration

It is a trite proposition that a declaratory relief is discretionary in nature and the court is always expected to exercise its judgment as to the reasonability and necessity of granting such a relief (*Narain Mitter v. Kishen Soondory Dessee* [1873] IA Supp 149, 162; *Beng LR 171-190*; and *Kathama Natchiar v. Dorasinga* [1875] 2 IA 169). The court is empowered to refuse relief in a variety of cases, for instance:

- (1) when there is no substantial injury to the plaintiff (*Chhakouri v. Secretary of State*, 5 Pat LJ 66; 52 IC 990); or
- (2) in anticipation of a contingency which may not arise at all (*Faryad Fatima v. Mujahid Abbas AIR 1934 All 1064*); or
- (3) where the defendant has not denied the plaintiff's claim (*Pichai v. Devaji AIR 1957 Mad. 21*); or

- a* (4) when the declaration may not be productive of any benefit to the party obtaining it (*Rajeshwar Singh v. Shyam Behari Singh* AIR 1927 Pat. 286); or
- (5) to declare a mere truism in law (*Narendra v. Basudeo* 14 IC 81); or
- b* (6) to declare the disability of the defendant to do an act when the same is similarly refused to be restrained by an injunction (*Lankapur Tea Co v. Gopalpur Tea Co* ILR 63 Cal. 1008); or
- (7) where the declaration will be infructuous or useless (*Biswanath v. Mytaba* AIR 1941 Oudh 422; and *Ismail v. Patna Municipality* AIR 1943 Pat 34);
- c* or
- (8) where the declaration could be rendered nugatory by the defendant (*Narain v. Sastri* ILR 37 All 313).
- d* All the authorities show a singular trend. It is this. That the court may refuse to entertain declaratory proceedings where there is no dispute at all, or where the matter is highly hypothetical or where it involves future rights. A declaration being a discretionary remedy, the Privy Council sought to draw a distinction between jurisdiction and discretion in *Rediffusion (Hong Kong) Ltd v. Attorney-General (Hong Kong)* [1970] AC 1136, 1155:
- e*
- When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, ie. to embark upon the inquiry whether facts exist which would entitle the court to grant relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it.
- f*
- It seems to me that the plaintiff is seeking to satisfy his intellectual curiosity when he files encl. 3 and this should not be entertained at all.
- g*
- As Vaisey J said in *Lever Bros and Unilever Ltd v. Manchester Ship Canal Co* [1945] 78 L1 LR 507, 509-510:
- h*
- It is not in accordance with the practice of the court to answer such questions. I am being asked in effect, to furnish the plaintiff company with an expository gloss upon the Act which it will be at liberty to use as and when required It is not within the province of the court to expound obscure provisions in Acts of Parliament merely by way of commentary and this perhaps applies especially to private Acts In the present proceeding the plaintiff company is in substance asking me to rewrite the section in such a way as to make it
- i*

a more useful weapon for use in future hypothetical hostilities with hypothetical opponents, and this I do not see my way to do.

a

I will now proceed to cite examples where the courts have refused to grant declaratory reliefs for for hypothetical and future questions:

(1) In *Faber v. Gosforth UDC* [1903] 88 LT 549, the plaintiffs wanted to have a piece of land which they were considering to develop near the defendant's sewer. The defendant disputed the plaintiffs right to do so whereupon the plaintiffs sought declaratory relief. The learned judge refused the declaration because no step had been taken towards the construction of the sewers and the matter was considered to be entirely hypothetical.

b**c**

(2) In *Roesin v. Attorney-General* [1918] 34 TLR 417, a suit was filed by an alien for a declaration that he was not liable for military service. But unfortunately there was no call-up notice that was issued to him and it was for this reason that the court held that the declaration that was sought for was purely hypothetical and refused to grant it.

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(3) The High Court of Australia in *Bruce v. The Commonwealth Trade Marks Label Association* [1907] 4 CLR 1569 saw it fit to strike out proceedings for declaratory relief where the relevant application for a trade mark had been withdrawn before the case came up for hearing. This was what Isaacs J said at p. 1571 of the report:

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The Privy Council refuses to give speculative opinions on hypothetical questions of law, but will only answer questions which arise in concrete cases involving private rights: *Attorney-General for Ontario v. Hamilton Street Railway* [1903] AC 524; see also *Barracclough v. Brown* [1897] AC 615.

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(4) Of pertinence to note would be the speech of O'Connor J in *California v. San Pablo and Tulare Railroad* [1893] 149 US 308, 314 where his Lordship explained that the court's duty:

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.... is limited to determining rights of persons or of property which are actually contravened in the particular case before it But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case can enlarge the power or affect the duty of the court in this regard.

h**i**

- a* (5) Then there is the speech of Jessel MR in *Curtis v. Sheffield* [1882] 21 Ch D 1, where his Lordship laid down the general rule that (see p. 4 of the report):

b It is not the practice of the Court to decide as to future rights, but to wait until the event has happened, unless a present right depends on the decisions, or there are some other special circumstances to satisfy the court that it is desirable at once to decide on the future rights. But where all the parties who in any event will be entitled to the property are of age and are ready to argue the case, the reason of the rule departs, and it becomes a bare technicality. The reason of the rule is this, that the court will not decide on future rights, because until that event happens it does not know who may be interested in arguing the question, and therefore may be shutting out parties, who, when the event happens, may be entitled to succeed.

d It is germane to summarise the law in a compendious manner. The following would suffice:

- (1) The court will be reluctant to decide academical or hypothetical questions (*Tindall v. Wright* [1922] WN 124; *Re Barnato* [1949] Ch 258 CA).
- e* (2) The court will not grant a declaration to a plaintiff whose claim is too indirect and insubstantial (*Thorne Rural District Council v. Bunting* [1972] Ch 470; [1971] 1 All ER 439).
- (3) No declaration would be granted by the court where there is no breach and no threat or intention to commit a breach of an agreement (*Mellstrom v. Garner* [1970] 1 WLR 603; [1970] 2 All ER 9 CA).
- f* (4) A declaration will not be made where it would serve no useful purpose (*Mellstrom v. Garner [supra]*).

g With these principles in mind, I will now proceed to examine the relevant issues raised by the parties not in its order of priority.

Public Authorities Protection Act 1948 ('PAPA')

h Mr Roger Tan Kor Mee for the second respondent argued that he must establish that the second respondent is a public authority before he could rely and invoke s. 2 of PAPA. Proceeding on these lines he pointed out that the act that was done was in pursuance of a written law or public authority and any alleged neglect or default should be in pursuance of a written law or public authority. By public authority he meant s. 14 of the Johore State Islamic Economic Development Corporation Enactment 1976 ("JSI") which enacts that

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PAPA shall apply to any action, suit, prosecution or proceedings against the corporation or against any member, officer, servant or agent of the corporation in respect of any act, neglect or default done or committed by him in such capacity. There was thus blanket protection of the second respondent under PAPA by virtue of s. 14 of the JSI. The duties and powers of the second respondent are contained in s. 18 of the JSI and for clarity the relevant sub-sections would be highlighted. Thus, that section reads as follows:

18(1) It shall be the duty of the Corporation to promote, stimulate, facilitate and undertake land development and agricultural, residential, industrial, mining and commercial development for the purposes of economic development of the Muslim in the State of Johore.

(2) The Corporation shall have powers for the purpose of the discharge of its duty under sub-section (1):

(a) to carry out all activities for commercial and industrial enterprises, the carrying out whereof appears to it to be requisite, advantageous or convenient for or in connection with the discharge of its said duty, including the manufacturing, assembling, processing, packing, grading and marketing of products, research and training.

(b) to promote the carrying on of such activities by other bodies or person, and for that purpose to establish or expand, or promote the establishment or expansion of other bodies to carry on any such activities either under the control or partial control of the Corporation or independently, and to give assistance to such bodies or to other bodies or persons appearing to the Corporation to have facilities for the carrying on of any such activities including financial assistance by the taking up of share or loan capital or by loan or otherwise;

(c) ...;

(d) to promote and co-ordinate the carrying out of such activities by the Government of the Federation or of the State, public authorities, any company, corporation, or other body or person.

and it cannot be denied that the agreement fulfils the aspirations of the second respondent. It is quite obvious that the agreement stipulates the commercial development for the benefit of the second respondent. Section 18(2)(k) of the JSI enacts that the second respondent is empowered to do such other things as it deems fit for the effective carrying out of its functions and powers. In my judgment, it is incumbent on the part of the second respondent to undertake the development as envisaged under the agreement. In my judgment, the second respondent has demonstrated that they squarely fall within the category of s. 2 of PAPA and that being the case, costs must go to not only the second

a respondent but also to the remaining respondents as envisaged under s. 2(b) of PAPA (in so far as the first and second respondents were concerned) read with the case of *Pirie v. Richardson (supra)* (on so far as the third and fourth defendants were concerned).

b Mr Lim Kian Leong, a product of Oxford, in arguing for the plaintiff advanced a very trite proposition of law. It is this: that not every act by a public authority would entail the application of PAPA. Emphasis was made on the following words as found in s. 2 of PAPA:

c ... any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority ...

d Now, s. 38 of the Government Proceedings Ordinance, 1956 enacts that any written law relating to the limitation of time for bringing proceedings against public authorities may be relied upon by the government as a defence in any civil proceedings against the government and using this as a leverage it was strenuously argued that the first respondent too could take advantage of this generous provision. In the context of the Government Proceedings Ordinance, 1956, PAPA is the singular most significant piece of legislation - particularly s. 2 thereof. The scope of PAPA, the English equivalent, has been debated by the English Judges extensively. This seems to be the remark of Viscount Simon LC in *Griffiths v. Smith* [1941] AC 170 when his Lordship was referring to the English Public Authorities Protection Act 1893. Lord Haldane sounded a warning in *Bradford Corporation v. Myers* [1916] 1 AC 242 to the effect that it would be difficult to extract from the words of the English PAPA a comprehensive principle that would serve as a useful guideline for the future. Incidentally, it is germane to mention that the English Public Authorities Protection Act 1893 is in *pari materia* with our PAPA except that the former prescribes a limitation period of six months while the latter provides for a period of limitation of 36 months. Two questions must be posed. The first would relate to the acid question of whether PAPA protect any person so long as they are acting under statutory powers or does it only protect those defendants who are considered "public authorities"? Viscount Simon LC in *Griffiths v. Smith (supra)* held the view that the English PAPA would not apply to protect defendants who are not, in some sense "public authorities" even though they are acting under statutory powers. Lord Buckmaster aptly remarked in *Bradford Corporation v. Myers (supra)* particularly at p. 247 of the report:

e Now it must be conceded that the Act applies only to a definite class of persons and not to a definite class of action. If the section stood alone, and were construed without reference to the introductory words of the statute, it would

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be wide enough to grant protection to any person who was acting in pursuance of a private Act of Parliament, but on more than one occasion the courts have pointed out that this cannot be in its true interpretation, and that 'any person' must be limited so as to apply only to public authorities.

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and applying this statement of the law to the factual matrix of the present case, PAPA would certainly protect the first respondent. The drafters of the JSI must have envisaged the limitation imposed by Viscount Simon LC in *Griffiths v. Smith (supra)* because they ingeniously incorporated s. 14 which brought into sharp focus the application of PAPA and the protection afforded by it to the second respondent and, consequently, without a doubt PAPA too must be vigorously applied in favour of the second respondent. This was my judgment and I so hold accordingly.

b**c**

The second question that needs to be posed would be this : Would every act by a "public authority" entail the application of PAPA? The House of Lords in *Bradford Corporation v. Myers (supra)* adopted the stand that the English PAPA should not be accorded a wide interpretation. As Lord Buckmaster remarked:

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While the preamble is necessary thus to constrict the meaning of the persons whom the statute is intended to protect, the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform.

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It is now germane to narrate the facts in *Bradford Corporation v. Myers (supra)* in order to understand better the decision of the House of Lords. In that case, the defendants, a municipal corporation, were authorised by an Act of Parliament to carry on a gas undertaking and were bound to supply gas to the inhabitants of the district. The defendants too had statutory authority, which they were however not bound to exercise, to sell the coke produced in the manufacture of the gas. The defendants contracted to sell and deliver a ton of coke to the plaintiff, and by the negligence of their agent the coke was shot through the plaintiff's shop window. More than six months later, the plaintiff commenced an action of negligence against the defendants. The defendants swiftly pleaded s. 1 of the Public Authorities Protection Act 1893 as a bar to the action (in *pari materia* with our s. 2 of PAPA except that their limitation period being six months whereas ours would be three years). The House of Lords held that the act complained of was not an act done in the direct execution of a statute or in the discharge of a public duty or the exercise of a public authority and, consequently, the Public Authorities Protection Act 1893 afforded no defence to the action. The House of Lords also held that the act of selling and supplying the coke to the plaintiff was

f**g****h****i**

- a* purely voluntary. What the defendants did was not something incidental to, or part of the process of carrying the gas undertaking and supplying gas compulsorily to the inhabitants.
- b* Back at the local scene would be the case of *Lee Hock Ning v. Government of Malaysia* [1972] 2 MLJ 12 where the court held that PAPA would not apply for the benefit of the respondent. The case concerned the non-payment of monies due and owing under a series of building contracts entered into between the appellant, a building contractor and the respondent, the Government of Malaysia. The respondent argued that as the contracts were for the building of schools, they were therefore entered into in the performance of a public duty or were incidental thereto within the meaning of s. 2 of PAPA so that the action should have been brought within 12 months next after the act, neglect, or default complained of in relation to that contract. Ong CJ delivering the judgment of the court had this to say at pp. 13 to 14 of the report:
- c*
- d* The simple truth is that the act or default complained of here was non-payment of the moneys due. Can it be said that such non-payment was an act done in pursuance or execution or intended execution of any written law, or of any public duty or authority, or an alleged neglect or default in the execution of any such law, duty or authority? Even assuming that the contracts in this case were entered into **in execution of a public duty** - as, of course, are all Government contracts - it was, nevertheless, the non-payment of the contract price, after work was completed to the Government's satisfaction, that was the act or neglect complained of. When the Government, or any other public authority, is sued for the price of goods sold and delivered or for work and labour done, I cannot see how the refusal to pay a just debt can be said to be an act or default in pursuance or execution of a public duty. What had the appellant done to justify the Government's refusal to pay him the contract price? Nothing, but for the counterclaim which failed. The non-payment, therefore, was not in pursuance of a public duty: consequently it could not have come within the provisions of section 2. As Lord Tucker said in *Firestone Tyre & Rubber Co. (S.S.) Ltd Singapore Harbour Board* [1952] MLJ 145, 147; [1952] A.C. 452, 464:
- e*
- f*
- g* It is essential to the protection afforded by the statute that the act or default in question should be in the discharge of a public duty or the exercise of a public authority. This assumes that there are duties and authorities which are not public. (See per Lord Buckmaster in the *Bradford Corporation* case).
- h*
- i* Factually both *Bradford Corporation v. Myers* (*supra*) and *Lee Hock Ning v. Government of Malaysia* (*supra*) are poles apart from the present case. Here, the acquisition exercise was withdrawn by a gazette notification dated 3 July 1997. Since the applicant was not a party under the agreement then both the first and second respondents are entitled to seek protection of PAPA. But had

the originating summons in encl. 3 been filed by either the third or the fourth respondents who were parties to the agreement, then the protection of PAPA would not come to the aid of the first and second respondents. There was no denial that the filing of the originating summons went beyond the 36 months time period as envisaged under s. 2 of PAPA. The applicant's main complaint was that generally PAPA should not be invoked for the benefit of both the first and second respondents on the ground that there was a failure to show the existence of a public duty. In my judgment, whether PAPA would apply would be dependent on whether the proposed defendant is a public authority. If the answer is in the negative, then PAPA would not apply. In the event, the answer is in the affirmative, the next question would be whether the neglect or default of the proposed defendant amount to a neglect or default in the execution of the proposed defendant's statutory duty or authority. If the answer is in the affirmative, then PAPA would apply. Applying these simple approaches the first and second respondents passed the tests with flying colours.

Going on an uphill task, Mr Lim Kian Leong relied on the decision of the then Federal Court in the case of *Government of Malaysia v. Ooi Kheng Kee* [1976] 1 MLJ 171 and argued that in that case the then Federal Court refused to accept the government's contention without proof and likewise here without affidavit evidence emanating from the respondents there was thus no proof and they therefore cannot succeed. On the facts, *Government of Malaysia v. Ooi Kheng Kee* can readily be distinguished. There although the suit was brought over twelve months after the accident yet by Act A 252, PAPA was amended to extend the period of limitation from twelve months to thirty-six months. It was on this basis that Suffian LP said that "this amendment may be retrospective, so as to save this suit though brought after twelve months." Suffian LP too took into account that the learned trial judge had "dismissed the application on the ground that at the time of the summons-in-chambers the government had not even filed their statement of defence. The judge considered that the fact that by the time the summons was heard the government had filed their defence pleading among other things limitation, did not matter." An attack was launched to the effect that the second, third and fourth respondents would not succeed in striking out the originating summons in encl. 3 because no affidavits were filed by them. The failure to file affidavits-in-support of an application under O. 18 r. 19(1)(a) of the RHC would not be fatal. I had dealt with this unending problem in the case of *Ibrahim bin Mohamad v. Ketua Polis Daerah Johor Bahru & Ors* [1996] 2 AMR 1964; [1996] 5 MLJ 15 where I said:

The defendants relied solely on Order 18, rule 19 (1)(a) of the Rules of the High Court, 1980 ["the RHC"] to advance their application in enclosure 8 and for convenience that rule is reproduced hereinunder:

- a** 19(1)The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that -
- (a) It discloses no reasonable cause of action or defence, as the case may be; ...
- b** The defendants did not file a supporting affidavit to back up their application in encl. 8. The plaintiff filed two affidavits to challenge encl. 8. One was in encl. 10 that was affirmed on 9 June 1995 and filed on 15 June 1995. The other was in encl. 15 that was affirmed on 6 February 1996 and filed on 9 February 1996. The issue that arose was whether in an application under
- c** O. 18 r. 19(1)(a) of the RHC this court must be compelled to take into account the plaintiff's affidavits in encls. 10 and 15 or must this court be content to look at the statement of claim only? The answer seems to be found in O. 18 r. 19(2) of the RHC where it says that:
- 19(2)No evidence shall be admissible on an application under paragraph (1)(a).
- d** It must be borne in mind that such a prohibition as clearly laid out in Order 18, rule 19(2) of the RHC is not meant to decorate the pages of the RHC but rather it should be vigorously applied and obeyed. The Rules Committee must have devised the rules for the expeditious despatch of litigation and, consequently, the courts must simply not stand idle but instead rise up to the
- e** occasion and enforce it accordingly. It is not surprising to note with awe that Mohamed Azmi F.J. speaking for the Federal Court in *New Straits Times (M) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 (FC), in strong terms construed Order 18, rule 19(1)(a) of the RHC in this way (at page 227):
- f** It is therefore clear law that in an application to strike out pleadings under Order 18, rule 19(1)(a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied is whether on the face of the pleading, the court is prepared to say that
- g** the cause of action or the defence is obviously unsustainable (see A-G of the Duchy of Lancaster v. L and NW Ry Co [1892] 3 Ch 274).
- Syed Agil Barakbah J in *Abu Bakar bin Haji Yusof v. Mohamed Hamzah bin Hanapiah & Anor* [1978] 2 MLJ 78 in the same vein said at page 79:
- h** Where the ground for striking out the statement of claim is that it discloses no reasonable cause of action, no affidavit is admissible. That is clear from the terms of the rule itself (per Chitty J. in *Republic of Peru v. Peruvian Guano Co* [1887] 36 Ch D 489).
- In *Karpal Singh & Anor v. PP* [1991] 2 MLJ 544 (SC), the then Supreme
- i** Court had to consider the question of 'whether the court has a general inherent

power to protect its process from abuse to safeguard an accused person from oppression or prejudice by striking out frivolous proceedings?, and Abdul Hamid Omar L.P. speaking for the Supreme Court in erudite terms had this to say at page 549:

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The court must be careful that the decision is not in conflict with the intention of the legislature as indicated in statutory powers. The inherent power apparently cannot be invoked to override an express provision of law or when there is another remedy available. Where the legislature has provided a particular mode of action or has vested an authority with powers to act in a particular manner and has prescribed the conditions limiting the scope of such action, the court cannot act outside those powers and conditions.

b**c**

Translating the sage words of Abdul Hamid L.P. to the present case, it can be said that the RHC has set conditions limiting the court to act within it and not outside its scope; always bearing in mind that the court cannot on its own accord override an express procedural requirement laid out in the RHC.

d

The case of *Government of Malaysia v. Ooi Kheng Kee (supra)* must be read in the context of *Tio Chee Hing & Ors v. Government of Sabah* [1981] 1 MLJ 207 and the case of *Haji Hussin bin Haji Ali & Ors v. Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 and when so read a different complexion would be added to it. On the question of limitation, I did say in *Ibrahim bin Mohamad v. Ketua Polis Daerah Johor Bahru & Ors (supra)* that there was a need to approach it strictly as the protection afforded by the statute of limitation cannot be waived and treated lightly. This was what I said in that case:

e

On the question of limitation, *Riches v. DPP* [1973] 1 WLR 1019 may be referred to where Davies L.J. had this to say (at page 1024 line G):

f

I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called upon to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the Limitation Act, 1939 and must fail.

g**h**

In the same vein, Stephenson L.J. in the same case propounded the following principles (at page 1026 line D):

On the other point I am willing to assume that a cause of action which is statute barred as clearly as the plaintiff's cause of action, nonetheless may be a reasonable cause of action within RSC, Order 18, rule 19(1)(a).

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- a** I say that on the authority of *Dismore v. Milton* [1938] 3 All ER 762, to which Davies L.J. has referred. But I agree with his comments upon that case. It seems to me that that case is in no way a decision that the court cannot strike out a claim which is statute barred on the ground that it is an abuse of the process of the court, where it is clear from the terms of the summons that the statute is going to be relied upon
- b** and where, as here, counsel has told the court that he has express instructions to rely upon the statute. Even in such a case there may be a possibility of a defendant bringing himself within one of the exceptions which avoid the statute and make it inapplicable. Again, however, this not such a case. There is no material put before the court which could possibly suggest that the statute will not be a complete answer to the
- c** plaintiff's claim. I think that it would be absurd for the court, faced with an application such as this to strike out, under its inherent jurisdiction or under the rules, a claim as an abuse of the process of the court, to shut its eyes to the fact that there is going to be raised an apparently unanswerable plea of the Limitation Act, 1939. That was the view of this court in *Wenlock v. Shimwell*, 27 April 1966; Bar Library Transcript No. 114A, to which Davies L.J. has referred, and was clearly the view of Lord Denning M.R. in *Hanratty v. Butler*, 12 May 1971; Bar Library Transcript No. 171, in the passage which Davies L.J. has also cited. Why should such a claim not be an abuse of the process of the court? Why should not the court exercise its inherent jurisdiction to stay or to dismiss
- d** an action which must fail?
- e**

Lawton L.J., approached the question of limitation in the *Riches* case in this way (at page 1027 at line B):

- f** One of the uncontested sets of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute barred and the defendant tells the court that he proposes to plead the statute and, on the uncontested facts, there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act, 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defence. The delivery of
- g** the defence occupies time and wastes money; and even more useless and time consuming from the point of view of the proper administration of justice is that there should then have to be a summons for directions, and an order for an issue to be tried, and for that issue to be tried before the inevitable result is attained.
- h** In *Tio Chee Hing & Ors v. Government of Sabah* [1981] 1 MLJ 207, the then Federal Court applied the principles set forth in the *Riches* case and held that the appellants' claim there was clearly statute-barred and not maintainable against a defence that relied on limitation. In *Tio Chee Hing's* case, the government of Sabah did not enter an appearance or file a defence but applied to strike out the statement of claim on the ground, *inter alia*, that the claim
- i**

was statute-barred. The learned trial judge held that the claim was statute-barred and he dismissed the claim for damages. On appeal to the then Federal Court, the decision of the learned trial judge was affirmed.

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Eusoff Chin J. (as he then was and now the Chief Justice) had occasion to consider the limitation period under section 2(1) of the Public Authorities Act, 1948 in *Haji Hussin bin Haji Ali & Ors v. Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 and there his Lordship in a well-considered judgment applied the *Riches* case and came to the conclusion that the three actions were filed after the three years' limitation period and dismissed the plaintiffs' actions with costs. On appeal to the then Federal Court, the decision of his Lordship Eusoff Chin J. (as he then was and now the Chief Justice) was affirmed.

b**c**

Now, it is trite law that the protection afforded by the statute of limitation cannot be waived by merely acknowledging service of a writ (see *The Llandovery Castle* [1920] P 119; *The Alnwick* [1965] P 357; [1965] 2 ALL ER 569; [1965] 1 Lloyd's Rep 320 (CA)). The limitation applies equally to counterclaims and cross-actions (see *The Gniezno* [1967] 2 ALL ER 738; [1967] 1 Lloyd's Rep 441. It is beyond peradventure that the long inordinate delay of 4 years 4 months 22 days should be construed against the plaintiff and on this very ground alone the plaintiff's claim in enclosure 2 should be dismissed forthwith.

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Locus Standi

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An argument was advanced to the effect that the applicant had no *locus standi* either in private law or in public law to file the originating summons in encl. 3. This was a sound submission as the applicant himself grounded his submission on the doctrine of privity of contract when he argued through his counsel that the second respondent was not a public authority and was not acting in the execution of a statutory right of duty. It was quite obvious that the applicant was not a party to the agreement. As Ali FJ said in *Mohamad Salleh v. Lau Siok Kee* [1974] 1 MLJ 102 FC at p. 103:

f

As for the alternative ground it is clear that in the circumstances of this case the appellant has no *locus standi* or no right to plead the Moneylender's Ordinance inasmuch as he was not a party to the loan transaction or to the Originating Summons. He is a complete stranger. In that context his action was plainly vexatious and frivolous.

g

Salleh Abas LP in an erudite judgment said in *Government of Malaysia v. Lim Kit Siang, United Engineers (M) Berhad v. Lim Kit Siang* [1988] 2 MLJ 12 SC especially at p. 20 of the report:

h

Every legal system has a built-in mechanism to protect its judicial process from abuse by busybodies, cranks and other mischief-makers by insisting that a plaintiff should have a special interest in the proceedings which he institutes.

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- a* This special interest is a nexus between him and the party against whom he brings his complaints to court and is known as *locus standi*.

His Lordship Salleh Abas LP continued in serious vein at p. 24 of the same case by referring to two local judgments on *locus standi*. This was what his Lordship said:

- b* In Malaysia, there are two important judgments on *locus standi*. The first is *Lim Cho Hock v. Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 2 MLJ 148 and the second is *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177.

- c* In *Lim Cho Hock's* case, the plaintiff was a Member of Parliament for the parliamentary constituency of Ipoh as well as a member of the Perak State Legislative Assembly for the constituency of Kepayang and a ratepayer within the area of the Ipoh municipality. He challenged the legality of the appointment of the Menteri Besar, Perak as President of the Ipoh Municipal Council. It was held that as a ratepayer the plaintiff had *locus standi*.

- d* In the second case, i.e. *Tan Sri Haji Othman Saat's* case, the respondent who was one of 183 applicants for state land felt aggrieved because after waiting for eight years without any response from the state authority, he subsequently learnt to his horror that the land he and others had applied for was alienated to a number of people who did not appear to deserve the land at all, one of whom was the appellant who was then the Menteri Besar of Johore. The Federal Court held that the respondent had *locus standi*. The failure of the state authority to decide upon his application, the alienation of the land in question to other persons and, conversely, his expectation that his application would be decided one way or the other and that he would not be kept in suspense for a long time only to learn later that the subject matter of his application had gone to someone else - all these constituted his standing to commence the proceedings.

- e*
- f*
- In my judgment, these two cases represent the high water marks of the law of *locus standi* in Malaysia, beyond which the court should be careful to tread. Both these cases can be justified on the basis that the plaintiff had a genuine private interest to be furthered and protected.

- g*
- What is important about *Tan Sri Haji Othman Saat's* case is that part of the judgment which dealt with the approach which the court should take when confronted with the question of *locus standi*. Here is what the court said:

- h* The sensible approach in the matter of *locus standi* in injunctions and declarations would be that as a matter of jurisdiction, and assertion of an infringement of contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice.
- i*

Taking this approach, let us now examine the basis of the respondent's claim on *locus standi*.

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Abdul Hamid Omar CJ (Malaya) in the same case defined "*locus standi*" in this way (see p. 27 of the report):

"*Locus standi*" is generally understood to mean the right of a party to appear and be heard by a tribunal. A litigant is said to have *locus standi*, in effect standing to sue in a court of law, if that court recognizes his or her ability to institute and maintain proceedings before it. The question of standing is thus separate and distinct from questions of the substantive merits and the legal capacity of the plaintiff. It follows, therefore, that a litigant may lack standing to bring a case which would succeed if brought by the right litigant.

b**c**

Put in a nutshell, the law of standing to sue has two fundamental rules. First, apart from certain cases in which standing to sue is in the discretion of the court, the plaintiff must possess an interest in the issues raised in the proceedings. Second, where the private plaintiff relies on an interest in the enforcement of a public right and not of a private right, standing will be denied unless the Attorney-General consents to a relator action, or the plaintiff can demonstrate some special interest beyond that possessed by the public generally.

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At p. 31 of the report, his Lordship Abdul Hamid Omar CJ (Malaya) wrapped up the issue of *locus standi* in these words:

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But in Malaysia, there is no provision in our Rules of the High Court equivalent to Order 53 rule 3 (7) of the English Rules of the Supreme Court. Thus, in my view, there shall be a stringent requirement that the applicant, to acquire *locus standi*, has to establish infringement of a private right or the suffering of special damage: see *Gouriet v. Union of Post Office Workers and Others* [1977] 3 All E.R. 70; [1978] A.C. 435, and also *Boyce's case* [1903] 1 Ch. 109 and this I consider to be the relevant test to apply when determining the question of standing.

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It is noteworthy that in the *Fleet Street Casuals case* [1982] A.C. 617; [1981] 2 ALL E.R. 93, Lord Diplock and Lord Scarman made the significant assertion that before the new Order 53, declarations and injunctions were confined to private law, being available only to those whose "rights" were infringed or threatened. Moreover, the majority distinguished the *Gouriet* case on the basis that the standing rule applicable to declarations and injunctions was now different where Order 53 was being used (at pages 638-639, 649 and 657-658). The new Order 53, they said, introduced not merely a standard procedure for all public law remedies but also a common standing test, namely, the Order 53, rule 3(7) "sufficient interest" test. Some of the judgments accepted that this formula was flexible enough to allow for differences in approach having regard to the relief sought (at pages 631, 645-646 and 658-659). Others acknowledged that the new rule was the occasion for rethinking their position on the law of standing (at pages 631, 646-646 and 647-648).

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- a* In all the circumstances, I would treat the *Fleet Street Casuals* case as one based upon a unique rule of court which has no counterpart in this country. This point is a crucial factor which does not appear to have been taken into consideration by the judge in *Tan Sri Haji Othman Saat's* case. In any event, as I have already noted, I would prefer the test of standing propounded by their Lordships in the *Gouriet* case, that is to say, the same standing rules apply whether the remedy sought is a declaration or an injunction. And, either the plaintiff's "rights" must be at stake, or when, as in the present case, the matter does not concern private rights, the plaintiff must suffer or be about to suffer damage peculiar to himself. In the *Tan Sri Haji Othman Saat* case, a liberal approach in considering the requirement of *locus standi* was advocated. Speaking for myself, I would hesitate to say that a mere "legitimate grievance" or "a real interest" in the suit will suffice to show standing to sue. Be that as it may, I would say that the decision in *Tan Sri Haji Othman Saat's* case was correct having regard to the facts of that particular case.
- c*

- d* Applying the preferred test, I fail to see how in the particular circumstances of this case, it could be said that the plaintiff had the necessary *locus standi* to institute or maintain the present proceedings.

In *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339; [1995] 2 AMR 1174; [1995] 2 MLJ 287, I echoed the same sentiments when I said:

- e* The plaintiff relied heavily on *Lim Cho Hock v. Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 2 MLJ 148 and *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177 to drive home the point that he too should be accorded *locus standi*. But these cases were described as 'the high-water marks of the law of *locus standi* in Malaysia' and that the plaintiffs in these cases 'had a genuine private interest to be furthered and protected' (see *Government of Malaysia v. Lim Kit Siang*).
- f*

- g* *Tengku Jaafar bin Tengku Ahmad v. Karpal Singh* [1993] 3 MLJ 156, *Abdul Razak Ahmad v. Kerajaan Negeri Johor & Anor* [1994] 2 MLJ 297, *Lim Cho Hock v. Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh*, *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* and *Government of Malaysia v. Lim Kit Siang* all show a singular trend and that trend is this: For a plaintiff to found an action against the defendant who is a public body, he must show that he has suffered a peculiar damage by the alleged public wrong and that he has a genuine private interest to protect.
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- i* Applying these principles of law to the factual matrix of the present case, the applicant cannot be said to have *locus standi* for the simple reason that the first respondent had withdrawn the acquisition of the applicant's land even before the applicant filed encl. 3. There was thus nothing on record for the

applicant to complain about. The applicant was nothing more than a “mere busy-body”, a “mischief-maker” out to seek personal satisfaction for himself. It was an academical exercise and the declaration sought for was merely hypothetical which would serve no useful purpose at all.

Rules of standing to seek judicial review of administrative actions have, through the years, developed not through legislation but rather by the courts themselves. There should not be too liberalised an approach to the rule of *locus standi* seeking judicial redress. But this does not mean that any administrative order may go unreviewed and no one would be qualified enough to seek judicial review. A classical example would be the case of *Blackburn v. Attorney-General* [1971] 1 WLR 1037 where Blackburn sought a declaration challenging principally the government’s right to surrender in part the sovereignty of the Crown by the decision of the government to join the Common Market and the Court of Appeal gave him standing even though he was ruled out on the ground that he could not impugn the Crown’s treaty - making power. Should I accord standing to the applicant? In my judgment, the applicant had not shown “sufficient interest” to seek a declaration. The applicant was not a party to the agreement and his fear that his land would be acquired had abated by the withdrawal of that acquisition exercise by the first respondent. All the citizens in the country are subject to LAA and the state authority can invoke the provisions of LAA at any time. No one would be spared. I am aware of the decision of the House of Lords in *R v. Inland Revenue Commissioners* [1981] 2 All ER 93 where the court there held that an applicant could move an application for a judicial review against an act of an authority if the applicant had “sufficient interest” in the matter and any person aggrieved by the failure of a public authority to do its duty would have *locus standi* to mount a challenge. Abdoolcader SCJ in *Government of Malaysia v. Lim Kit Siang* (*supra*) gave a dissenting judgment and his Lordship without minching words said boldly (see p. 43 of the report):

Liberalization of standing has in varying degrees been proceeding or proposed in other common law jurisdictions as I have shown in these two judgments, and it would be a shame if we were to lag behind.

The majority decision in the case of the *Government of Malaysia v. Lim Kit Siang* (*supra*) took a restrictive view in regard to the rule of standing. I am of the same view and am not prepared to take cognisance of the liberal approaches enunciated by other judges from the common law jurisdictions in regard to the issue of *locus standi*. I am constrained to hold and I so hold that the applicant here had no *locus standi* to pursue encl. 3.

- a* Lest I be accused of not referring to the decisions of the other judges from the common law jurisdictions, I shall now endeavour to do so – not so much as to follow them blindly but rather to gloss through them.
- For a start, reference is now made to the case of *R v. HM Treasury* [1985] 1 All ER 589 where the court there agreed that the applicant as a tax-payer had
- b* the right to be heard and had sufficient *locus standi* to challenge by way of a judicial review the payment of a large sum of money by the government to the European community.
- Then, it would be the case of *R v. Foreign Secretary, ex parte Rees Mogs* [1994] QB 552 which involved a challenge by the applicant for a declaration that the UK government could not lawfully ratify the treaty on European union. The court granted the applicant *locus standi* because the applicant was sincerely concerned about the constitutional issues.
- c*
- Finally, reference should be made to the case of *R v. Inspectorate of Pollution, ex parte Greenpeace Ltd (No. 2)* [1994] 4 All ER 329 where Greenpeace, a well-known environmental organisation, sought for a judicial review by way of a *certiorari* to quash the decision of the respondents in granting an application of a company for variations of authorisation to discharge radioactive waste from the company's premises so as to enable the company to test its
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- new thermal oxide processing plant. Greenpeace argued that the decision was not lawfully made. The issue before the court was whether Greenpeace had the necessary *locus standi* to seek and obtain *certiorari*. The court ruled that Greenpeace had *locus standi*.
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- These cases show that great strides have been made towards liberalising the *locus standi* rule. But in Malaysia the law is as exemplified in *Government of Malaysia v. Lim Kit Siang (supra)* and I am bound by it. Other land owners were also affected by the acquisition even though they were not parties to the agreement and yet they remained silent. The applicant's land formed a mere 0.3% out of a total acreage of 6,000 acres that were acquired. The
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- applicant here is a fiery individual bent on seeking that declaration even though the threat of acquisition has since been dissipated by the withdrawal that was gazetted on 3 July 1997. Enclosure 3 was filed too late in the day; it was filed on 9 July 1997 and the delay by a mere five days speak volumes against the applicant. I refused *locus standi* to the applicant.
- g*
- Section 18 of the JSI as reproduced somewhere in this judgment does not impose a statutory duty on the second respondent to consult the applicant in matters of land acquisition notwithstanding the fact that the agreement seeks to acquire the plaintiff's land. The JSI gives statutory strength to the second respondent and the latter has acted within that framework. There was no
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evidence emanating from the applicant that he filed encl. 3 on behalf of the other land owners. There was also no evidence that the applicant sustained serious suffering and damage peculiar to him. In the words of Gopal Sri Ram JCA in *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23 especially at p. 47 of the report:

(iii) there were persons, apart from the respondents, who were adversely affected by the project. There was no special injury suffered by the respondents over and above the injury common to all others. The action commenced by the respondents was not representative in character and the other affected persons were not before the court; and

(iv) the judge did not take into account relevant considerations when deciding whether to grant or to refuse declaratory relief. In particular, he did not have sufficient regard to public interest. Additionally, he did not consider the interests of justice from the point of view of both the appellants and the respondents.

Mokhtar Sidin JCA in the same case echoed the same sentiments in equally strong words (see pp. 59 to 60 of the report):

As can be seen, all the people in that area suffer the same fate. As such, the respondents' suffering and damage are not different from the damage and suffering from the rest of the people there. To me, the respondents must satisfy the court that they suffered exceptional damage and suffering compared to the others there and not the public from other parts of Sarawak in particular or Malaysia in general. It is imperative to point out that the respondents' actions are not representative of the people in that area but are individual actions on their own. It appears to me that there is no evidence to show that the respondents had suffered special suffering and damage peculiar to them as required by the exception.

Booth & Co (International) Ltd and others v. National Enterprise Board and others [1978] 3 All ER 624 was heavily relied upon by the plaintiff. That was a case involving the National Enterprise Board ("NEB"), a public corporation, which entered into contracts which on their face value were contrary to the statute that created the NEB. The applicant was not a party to such contracts but nevertheless its business was adversely affected by them. The applicant applied for declarations, *inter alia*, that the NEB was acting unlawfully in implementing the contracts. The NEB then applied to strike out the application on the ground that the applicant had no *locus standi* as a private person to sue for breach of statutory duty. The court dismissed NEB's application to strike out and held that the declarations could proceed. The court was of the view that it was arguable that the contracts were in breach of the relevant rules and that the applicant as a private person was an aggrieved

- a* person who suffered peculiar injury greater than the public at large and so could seek the declarations asked for. Forbes J said at p. 633 of the report:

b The plaintiffs argue that *Phillips v. Britannia Hygienic Laundry Co* [1923] 2 KB 832, [1923] All ER Rep 127 decides no more than this, that where a statute provides a remedy for breach of duty this is *prima facie* an indication that no private person, even if suffering a peculiar injury, was intended to have a right to sue for breach of that duty. But equally that where no such remedy is provided, as in this case, it is open to such a person to sue if he can show peculiar injury, and by peculiar injury I mean something over and above any injury suffered by the public at large. There is nothing, they suggest, in the speech of Lord Simonds in *Cutler v. Wandsworth Stadium Ltd* [1949] 1 All ER 544 at 547-548, [1949] AC 398 at 407-408, which is relied on by the defendants, which says anything contrary to this:

d It is, I think, true that it is often a difficult question whether where statutory obligation is placed on A., B., who conceives himself to be damnified by A.'s breaches of it has a right of action against him. But on the present case I cannot entertain any doubt. I do not propose to try to formulate any rules by reference to which such a question can infallibly be answered. The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed, that a right of civil action accrues to the person who is damnified by the breach. For if it were not so, the statute would be a pious aspiration. But, as Lord Tenterden, C.J., said in *Doe d. Rochester (Bp.) v. Bridges* [1831] 1 B & Ad 847 at 859: "... where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that a performance cannot be enforced in any other manner." (Then he refers to *Pasmore v. Oswaldtwistle Urban District Council* [1898] AC 387, [1895-9] All ER Rep 191). But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or, indeed, more favourably to the appellant, than in the words of Lord Kinnear in *Black v. Fife Coal Co., Ltd* [1912] AC 149 at 165: "If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson v. Newcastle Waterworks Co.* [1877] 2 Ex D 441 and by Lord Herschell in *Cowley v. Newmarket Local Board* [1892] AC 345 solves the question. We are to consider

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the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises in common law a correlative right in those persons who may be injured by its contravention.”

a**b**

Unfortunately, in the present case the applicant failed to show that he had suffered exceptional damage “above any injury suffered by the public at large.” In my judgment, the second respondent would suffer damage of a special kind if the declaration sought for in encl. 3 was acceded to by this court. It would be a waste of precious judicial time to proceed with encl. 3 as the whole matter has become academic or hypothetical simply because the acquisition has been withdrawn.

c

Order 18 r. 19(1)(a) of the RHC speaks of “it discloses no reasonable cause of action” and Mahadev Shankar JCA in *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 defined a “cause of action” by referring to a dictionary. This was what his Lordship said at p. 678 to p. 679 of the report:

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With respect, I think we should first ask ourselves what a ‘cause of action’ is. *1 Stroud’s Judicial Dictionary* (5th Ed) at page 378 gives 20 separate interpretations of this expression. I think the first is appropriate:

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A ‘cause of action’ is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher M.R., *Read v. Brown* 22 QBD 128; this case was applied in *Bennett v. White* [1910] 2 KB 643)’.

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Further down the same page of the same judgment, his Lordship continued and it spills to p. 680 of the report:

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But Order 18, rule 19(1)(a) only requires that the court assume the truth of the ‘primary facts’ alleged. It does not require that the petitioner’s inferences from those facts should also be assumed to be true, unless those inferences necessarily follow. Nor is the court obliged to accept the ‘conclusions’ alleged or the relief sought, unless the factual basis those conclusions or relief have been pleaded. In the present case, there were nine respondents and the facts alleged against each had to be separately considered.

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The words ‘plain and obvious’ also need clarification. This case involved complex questions of company law. What may be ‘plain and obvious’ to a specialist in this field may not be so to another who does not have this

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- a** specialized knowledge. I therefore feel obliged to state that the standard here is an objective one and implies that the perception required here is that of a person who has the required expertise. Support for this view can be found in *McKay v. Essex Area Health Authority* [1982] 2 ALL ER 771, where it was held that the right course was for the court to strike out a claim, even though it required a long and elaborate hearing before the court was satisfied that there was no cause of action, because the plaintiff was entitled to be relieved of the objection to meet it.
- b**

And in *Re Saul D Harrison & Sons* [1994] BCC 162 at page 179 where Hoffman L.J. said:

- c** But the question in this case is whether on the evidence taken as a whole and assuming in favour of the petitioner any disputed questions of primary fact, there is any case to answer. Of course it is always possible that discovery and cross examination may produce some written or oral confession that the board were indeed acting in bad faith. But I do not think that the petition can be allowed to proceed to trial simply in the hope that something may turn up.
- d**

And in *Re Ringtower Holdings plc* [1988] 5 BCC 82 at page 84 where Peter Gibson said:

- e** Further, I have anxiously throughout borne in mind the cautionary words of Lord Templeman in *Williams & Humbert Ltd v. W & H Trade Marks (Jersey) Ltd & Ors* [1986] 1 ALL ER 129 at page 139:

- f** ... if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself.

- g** If the applicants can satisfy the court that the petitioners' claims are manifestly unsustainable or are an abuse of the process, justice requires that the petition (even one running to 28 pages, as this one does with the proposed amendments) be struck out forthwith.

- h** There is an added dimension to Order 18, rule 19(1), in that the court will also strike out 'if the action has been brought solely to obtain relief which the court has no power to grant' (*Dreyfus v. Peruvian Guano Co* [1889] 41 Ch D 151), or if relief be asked on a ground which is no ground such relief. (*Johnston v. Johnston* [1884] 33 WR 239 - see 1995 1 SCP para 18/19/11).

- i** Obviously the facts in *Tuan Haji Ishak bin Ismail (supra)* were far more complex, yet the Court of Appeal allowed the appeal. Mr Lim Kian Leong argued that there was no need to show a cause of action on the part of the

plaintiff in order to obtain a declaration. The short answer can be found in the judgment of Wan Suleiman FJ in the case of *Haji Hussin bin Haji Ali & Ors v. Datuk Haji Mohamed Bin Yaacob & Ors; And Connected Cases* [1983] 2 MLJ 227, 231 where his Lordship said:

Another point made by Bankes L.J. should be noted. Though a cause of action is not necessary, he said, still ‘It is essential ... that a person who seeks to take advantage of the rule must be claiming relief’, and ‘The claim for a declaration is not in itself a claim for relief’. Further he made it clear that the word “relief” must be given its fullest meaning. Zamir is of the view that probably all that Bankes L.J. meant was that a declaration could not be claimed for the mere sake of satisfying the curiosity of the plaintiff as to his rights, but should be claimed to relieve the plaintiff from a real difficulty, or, in other words, for some useful purpose.

Declaration is in fact an all - encompassing remedy which the applicant sought. Declaratory actions serve two purposes. Firstly, to obtain relief before the damage is caused and, secondly, to avoid the dilemma and untold uncertainty by way of a clarification of the legal position of applicant (*Petaling Tin Bhd v. Lee Kian Chan* [1994] 1 MLJ 657 at 673). A declaration serves to declare the applicant’s legal rights as it has no coercive force at all. Section 41 of the Specific Relief Act 1950 makes provisions for declaratory decrees. But, its application can only be put in motion when the applicant has some legal right or legal position to advance and provided the court will act in the applicant’s favour. A much broader power to issue declaration can be found in O. 51 r. 16 of the RHC. While s. 41 of the Specific Relief Act 1950 enables the applicant to seek a declaration as to his legal character or status or right to property, O. 51 r. 16 of the RHC, on the other hand, gives some leeway to the applicant in that the applicant needs only to establish that his legal interests are peculiarly affected (*Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177 and *Lim Cho Hock v. Speaker, Perak Legislative Assembly* [1979] 2 MLJ 85). Lee Hun Hoe CJ Borneo had this to say of O. 51 r. 16 of the RHC in *Datuk Syed Kechik bin Syed Mohamed v. The Governments of Malaysia and Sabah* [1979] 2 MLJ 101:

The prevailing view seems to be that the court’s jurisdiction to make a declaratory order is unlimited subject only to its own discretion.

but, with respect, the facts in *Datuk Syed Kechik* are poles apart from the present case. There was a persistent “cloud of fear” on *Datuk Syed Kechik*. In the words of Lee Hun Hoe CJ Borneo at p. 107 of the report:

The declaration sought is not as to his future right but as to his present right. There has been a threat to his right by official statement of the party in power. The threat has never been denied or withdrawn. A political party can only

- a** realise its objectives if it were in power. He need not have to wait for something to happen before seeking the court's protection. See *Dyson v. Attorney-General* [1911] 1 K.B. 410; *Grant v. Knaresborough U.D.C.* [1928] 1 Ch. 310 and *Pyx Granite Co. Ltd v. Ministry of Housing and Local Government & Ors* [1960] A.C. 260. A declaratory order will eliminate anxiety of having to live under a cloud of fear. In granting a declaration the court
- b** has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment that may result on the other hand. As to the determination of future right its importance for certain purposes is not in doubt, particularly when a mere declaration is usually the only remedy. Zamir on '*The Declaratory Judgment*' at page 206 states:
- c**
- It is not uncommon for persons to confront an allegation that at some future date they will become liable to another, or that they will not have a certain right which they expect to come into existence, or that their existing right will then expire. They may in such circumstances bring a declaratory action to remove the cloud from their future rights.
- d**
- Here, the "cloud of fear" if at all it existed had dissipated because the acquisition had been withdrawn by the first respondent. In my judgment, even if a declaration was granted by this court in favour of the applicant there was nothing to prevent the first respondent from acquiring the applicant's land bearing in mind that there was no requirement under the LAA for the first
- e** respondent to enter into an agreement of whatever kind in order to acquire the applicant's land. *Thorne RDC v. Bunting* [1972] Ch 470, [1971] 1 All ER 439 lays down the proposition that the claim for a declaration must not be too indirect and insubstantial or such as would not give the plaintiff any real
- f** relief from any liability, or disadvantage or difficulty. The principle of law distilled in *Gibson v. Union of Shop, Distributive and Allied Workers* [1968] 2 All ER 252; [1968] 1 WLR 1187 should be vigorously applied to the factual matrix of the present case. That principle of law can be summarised in this way: If the question was a live issue at the time when the action was brought and raised substantial legal questions, a declaration will be granted even though
- g** this relief has been rendered virtually unnecessary by the lapse of time. Here, when encl. 3 was filed on 9 July 1997 the issue was already dead since the first respondent had withdrawn the acquisition exercise on 3 July 1997 and there was nothing left for this court to declare. This was my judgment and I so hold accordingly.
- h**
- Karminski LJ had this to say in *Mellstrom v. Garner and Others* [1970] 2 All ER 9 CA especially at p. 12 thereof:
- i**
- I also agree with the judgments of Harman and Salmon L. JJ. and desire only to add this. The practice relating to declarations regarding the future is one which is exercised, as I understand it, with very considerable reserve. It is not

the practice to grant one if it is embarrassing or useless for any good purpose. The declaration sought here is unlikely, as I see it, to be embarrassing; but I cannot see, for the reasons already given, what, if any, useful purpose it could possibly serve. In fact I have come to the conclusion that it would not serve any useful purpose, and therefore ought not to be granted.

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I agree that the order must be set aside.

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Wan Adnan J (now Chief Judge Malaya) succinctly said in *Pedley v. Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307, 308:

The power of the court to make a declaratory judgment is discretionary. The court will not make a declaratory judgment when the question raised is purely academic. The court should not be required to answer academic questions' - *Howard v. Pickford Tool Co Ltd* [1951] 1 KB 417. Although the remedy by way of declaration is wide and flexible yet it will not be granted to a plaintiff whose claim is too indirect and unsubstantial and would not give him 'relief' in any real sense, i.e. relieve him from any liability or disadvantage or difficulty: *Thorne Rural District Council v. Bunting* [1972] 1 All ER 439.

c**d**

Way back in 1963, Hepworth J said in *Chop Chuah Seong Joo v. Teh Chooi Nai & Ors* [1963] 29 MLJ 96, 99:

The power to make a declaratory judgment is a discretionary one; the discretion should be exercised with care and caution and judicially with regard to all the circumstances of the case and, except in special circumstances, should not be exercised unless all parties interested are before the Court. It will not be exercised where the relief claimed would be unlawful or unconstitutional, or inequitable for the Court to grant, or contrary to the accepted principles upon which the Court exercises its jurisdiction. The Court will not make a declaratory judgment where the question raised is purely academic, or the declaration would be useless or embarrassing, or where an adequate alternative remedy is available, and will be slow to make a declaration as to future or reversionary rights; a declaration that a person is not liable in an existing or possible action is one that will rarely be made, although it is not beyond the power of the Court in a very exceptional case to make such a declaration. (*Halsbury's Laws of England*, 3rd edition, Volume 22, page 749, paragraph 1611).

e**f****g**

The principles of law distilled from these three cases would fetter and shackle the applicant to the ground firmly. There was no dispute in existence in the present case for this court to grant the declaration. Indeed it would be an exercise in futility for this court to entertain encl. 3. The applicant here was trying to portray himself as a person genuinely anxious to prevent his right from being challenged or infringed at some later date. Because of this stand, the applicant thought it was worth his while to incur the expense and bother

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a of litigation in order to ascertain his legal position as early as possible. But, his Lordship Bailhache J in *Guaranty Trust Company of New York v. Hannay & Company* [1915] WN 38 aptly said:

b ... a declaration would not be made merely because the person asking for it feared that at some time or other he might be liable to an action, and desired to put an end to a position of uncertainty or of suspense and anxiety.

c *Draper v. British Optical Association* [1938] 1 All ER 115 is a classical example of an abstract question where the court refused to entertain. There, the facts of which are quite straightforward showed that the defendant association had written to the plaintiff, who was one of its members, to the effect that a meeting of the association would consider the removal of his name from the list of its members, on the alleged ground that he had violated its code of ethics, and asked whether he wished to attend and be heard. Thereupon, and before that meeting was held, the plaintiff issued a writ and sought for a declaration that the association was not entitled to attempt to enforce the code on him or to remove him from its register of members, and for an injunction to restrain it from so doing. The action was promptly dismissed, and Farwell J pointing out that the association was not threatening to enforce its code on the plaintiff, and that nobody knew what the result of the proposed meeting would be, aptly remarked at p. 121 of the report:

e If, at the meeting, when it is held, the association decide that the plaintiff has not been guilty of conduct which renders him unfit to be a member, then he will not be damnified, and this action will have been wholly unnecessary. “

His Lordship Farwell J also observed at p. 119 of the report:

f It may be that, if and when the defendants hold their meeting, they may think it right to seek to enforce against the plaintiff this code of ethics, and if they do, it may be that they will be acting *ultra vires*. But, until they have sought to enforce that code the plaintiff, I myself do not consider that it is for me to determine this question in the abstract.

g The sage words of Greer LJ in *Ruislip - Northwood Urban District Council v. Lee* [1935] 145 LT 208 bear repetition. At p. 214 of the report, his Lordship said:

h I do not think that anyone can go about and say that ‘Mr. X will probably be going to make a claim against me. He has not said so. I have no reason to suppose it, except my own thoughts, and I will therefore issue a writ against him and claim a declaration that if he ever does make that claim against me he will be wrong.’ You cannot do that.

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Re Clay [1919] 1 Ch 66 is yet another example. There the plaintiffs sought for a declaration as to whether the defendant was entitled, under a deed of indemnity, to recover from them money which he paid or was ordered to pay as costs in certain legal proceedings. The defendant, in a letter addressed to the plaintiffs, reserved his rights under the deed of indemnity but nevertheless the defendant had made no claim whatsoever upon it. The Court of Appeal held that the plaintiffs were not entitled to the declaration. In erudite language, Swinfen Eady MR said at p. 78 of the report:

And it is not open to a person, certainly to one against whom no claim in fact has been made, to cut the matter short by bringing an action at his option and saying 'I wish to have it determined that you have no claim whatever against me'.

Another abstract declaration that was sought for can be seen in the case of *Re Barnato* [1949] Ch 21 which was affirmed *vide* [1949] Ch. 258. I will now proceed to recite the facts as briefly as possible. There, a testator vested a fund in trustees, and made his daughter the tenant for life of the fund. With the consent of the daughter, the trustees wanted to make an advancement out of the trusteeship fund to a child of hers. They feared, quite naturally, that in the event of the daughter dying within five years from the date of the proposed advancement they would be accountable to the Crown for any estate duty payable. The solicitor of Inland Revenue, in a letter addressed to the trustees, expressed the opinion that this indeed would be the case. Without further ado, the trustees hastily took out an originating summons asking the court to determine this question and conveniently joined the Commissioners of Inland Revenue as defendants. The Commissioners applied to the court for them to be struck out as having been joined improperly. It was held that the question raised by the summons was purely hypothetical and therefore no declaration would be given. Lord Greene MR had this to say at p. 269 of the report:

The Crown has made no claim, for the very simple reason that it is not entitled to make a claim. It will be entitled to make some claim, or it may be it will think itself entitled to make a claim in the event of the tenant for life dying before the expiration of five years, but the fact that they have expressed an opinion does not, in my opinion, amount to the same thing as is present in such cases as we have been referred to where an instant claim by the Crown was concerned.

Hypothetical and abstract questions would not be entertained by the courts and declarations sought therein would be rejected outright. There are plenty of authorities on this point. The above few authorities that have been referred and digested in brief forms would suffice to drive home the message that the

- a* applicant's originating summons in encl. 3 should be dismissed outright, in *limine*.

Bad Faith

- b* An argument was advanced by Mr M Pathmanathan for the third and fourth respondents to the effect that the applicant was not genuine and that he was used as a tool, as a front for Stamford Holdings when he filed encl. 3. The applicant was said to lack *bona fide* and his *bona fide*, if at all, was questionable. Enclosure 3 was said to be an action actuated by malice aforethought as the applicant was being used as a proxy for another party who
- c* was waiting in the wings ever ready to seek revenge and who has an axe to grind. The applicant was nothing more than a mere puppet whose actions were dictated by Stamford Holdings. It must be recalled that Stamford Holdings sought to intervene but this court refused to accord that right and the order of this court remained as solemn testimony of Stamford Holdings failure to
- d* intervene. No appeal was filed against that refusal to intervene. The applicant's land that was supposed to be acquired was but a drop of water in the big ocean - it was insignificant. The second, third and fourth defendants must be credited for undertaking a detailed plan to develop Johor Bahru as a well planned city. Several studies were undertaken and all these have been exhibited
- e* in the agreement. The detailed plan will see Johor Bahru developing in an orderly manner and not haphazardly. Enclosure 3 should be nipped in the bud as it has far reaching consequences. In order to come to court the applicant must have a dispute against all the respondents. The applicant comes to court carrying a vengeance of a kind, unseen anywhere. The applicant didn't come
- f* to court when the threat of acquisition was in the air but he chose to come to court when that threat has been sniffed away. In short, the threat of acquisition has ceased. There was no foreboding fear. It was clear that the applicant came to court carrying the torch of someone else. If the applicant's grievance was in regard to the acquisition he should seek his remedy under the LAA by challenging the award. But alas, this was not the case. It must
- g* be emphasised that the government of the day can at any time, if not for the agreement or for any other reason, proceed to acquire not only the applicant's land but also other lands belonging to other land owners. Here, the government of the day was not denying the applicant's title to his land. The language employed in drafting encl. 3 was crafted and designed to create mischief of
- h* the highest order because it was drafted outside the scope of s. 41 of the Specific Relief Act 1950. In my judgment, encl. 3 was "a piece of useless litigation and an abuse of process which ought not to be encouraged" (*Webster v. Bakewell Rural District Council (No: 2)* [1917] LT, vol. 115 at p. 678) and I may add to be dismissed forthwith. The House of Lords in the
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case of *Glasgow Navigation Company v. Iron Ore Company* [1910] AC 293 dismissed an action that was hypothetical. The judgment of the court was as follows (see p. 294 of the report):

The House (Lord Loreburn L.C. and Lords Atkinson and Shaw of Dunfermline), being of opinion that the action was brought to try a hypothetical case, owing to the agreement of both parties not to put in evidence the bill of lading, declined to make any order, except that the action be dismissed and that no costs be allowed to either party here or below.

Lord Loreburn L.C. stated that it was not the function of a court of law to advise parties as to what would be their rights under a hypothetical state of facts.

The following order was made:

Counsel were called in, and a preliminary objection having been taken as to the competency of the said appeal, and counsel having been heard thereon and having been directed to argue the merits of the appeal, counsel were accordingly heard to argue the merits and due consideration being had of what was offered on either side in this cause; and it appearing to their Lordships that the pursuers and defenders, though without any wrong purpose, concurred in asking for an order upon the footing that they were bound by a contract different from the contract by which they were actually bound, the House declines to make any other order than the following, viz:

Ordered and adjudged that this action be dismissed; and it is further ordered that no costs be allowed to either side here and below.

Here too, the declaration sought for was hypothetical. The applicant's prayer in encl. 3 was not a declaration of his right. It sought for, *inter alia*, a declaration that the first respondent was not obliged to acquire his land. Mr Rasid Sudin for the first respondent rightly argued that the first respondent was entitled to ride "piggy back" on the successes of the second, third and fourth respondents by relying on the judgment of Abdul Malek Ahmad J (now JCA) in *Wong Peng Yan Benjamin v. Genting Bhd & Anor* [1993] 3 MLJ 713. His Lordship in that case said at p. 724 of the report:

For *res judicata*, the parties need not be the same. It had been so held in *North West Water Ltd v. Binnie & Partners (a firm)* [1990] 3 ALL ER 547 that:

Where an issue had for all practical purposes been decided in a court of competent jurisdiction the court would not allow that issue to be raised in separate proceedings between different parties arising out of identical facts and dependent on the same evidence, since not only was

- a* the party seeking to relitigate the issue prevented from doing so by issue estoppel but it would also be an abuse of process to allow the issue to be relitigated. It followed that since the issue of negligence had already been determined against the consultant engineers in the first action they were estopped from denying negligence and further it would be an abuse of process if they were to be permitted to deny negligence. Their defence
- b* denying negligence would accordingly be struck out.

- and clearly applying this passage vigorously to the present case there would be a relitigation of the same issues if this court ruled that encl. 11 should only be decided between the applicant and the second, third and fourth respondents only. In my judgment, a decision under encl. 11 must necessarily
- c* include the first respondent also.

At this juncture, it is germane to refer to a passage of a book entitled “*An Introduction To Administrative Law*”, 2nd edn, by Peter Cane particularly at p. 69 thereof. There the learned author said:

- d* The prerogative orders, declarations, and injunctions are all discretionary remedies. This means that even if the applicant has standing, has made the application in good time, and can establish that the respondent has acted illegally, he or she may be denied relief if the court thinks, for some reason, that relief should not be granted (*Sir Thomas Bingham* [1991] PL 64). The
- e* fact that a decision is void or that some action or inaction is illegal does not impose on the court any obligation to award a remedy to the applicant. This discretion can also be used to justify refusal of leave to apply for judicial review under RSC Order 53; and so it is sometimes said that the whole judicial review jurisdiction is discretionary, not just the remedies.
- f* Further down the same page and spilling to p. 70, the learned author continued:
- The general idea underlying this discretion seems to be that a court should not award judicial review remedy if to do so would cause (query, serious) (See *R. v. Attorney-General, ex parte Imperial Chemical Industries Plc* [1987] 1 CMLR 72) damage to the ‘public interest’ such as would outweigh the injury
- g* which the applicant would suffer as a result of refusal of a remedy. But this principle is hopelessly vague. Do the cases give any more concrete guidance as to how this discretion might be exercised? In *R. v. Monopolies and Mergers Commission, ex parte Argyll Group Plc* [1968] 1 WLR 763, 774-5, Lord Donaldson MR said that courts must show ‘a proper awareness of the needs of public administration’: a court should be wary of striking down a decision
- h* if it is clear that the same decision would have been made even if the decision-maker had not acted unlawfully; or if doing so would unduly delay the conduct of government business, or if members of the public are likely already to have relied on the challenged decision; or if the court thinks that the applicant’s motivation in making the application was improper or vexatious or frivolous.
- i* Several of these points were taken up in the *Takeover Panel case* [1987] QB

815, in which Lord Donaldson said that the court should be wary of allowing judicial review to be used as a tactical or delaying device by a company which is the target of a takeover bid or by one of several rival bidders.

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Bearing in mind that the proposed acquisition had been withdrawn, the applicant's motive in filing encl. 3 can be said to be "improper or vexatious or frivolous." Judicial review should not be exercised in favour of the applicant. The upshot of it all was this: encl. 11 should be dismissed with costs.

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